

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2018040513

DECISION

Administrative Law Judge Carmen D. Snuggs, Office of Administrative Hearings, State of California, heard this matter on June 7, 2018, in Culver City, California.

Lisa Basiri, Fair Hearing Specialist, represented Westside Regional Center (WRC or Service Agency). Claimant, who was not present, was represented by his father who appeared telephonically.<sup>1</sup> WRC did not object to Claimant appearing by telephone.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on June 7, 2018.

ISSUE

Shall WRC be responsible for funding Applied Behavioral Analysis (ABA) services, provided to Claimant by Intercare Therapy?

EVIDENCE CONSIDERED

The Service Agency's Exhibits and Witnesses: Service Agency's exhibits 1-8. Soryl

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<sup>1</sup> Initials and family titles are used to protect the privacy of Claimant and his family.

Markowitz, Autism and Behavior Specialist.

Claimant's Exhibits and Witnesses: Claimant's father did not submit any exhibits on Claimant's behalf. Claimant's father testified on behalf of Claimant.

## FACTUAL FINDINGS

1. On April 3, 2018, the Service Agency sent a Notice of Proposed Action to Claimant's father indicating that it denied Claimant's request for the Service Agency to fund Claimant's ABA<sup>2</sup> sessions with Intercare Therapy (Intercare). Claimant timely filed a request for fair hearing.

2. Claimant is a 10 year-old male consumer of the Service Agency who is eligible for services due to an autism diagnosis. The Service Agency currently funds 14 hours per month of in-home respite services, social skills training for up to 10 times per month, and 27 hours per month of specialized supervision services. Claimant is currently enrolled in Medi-Cal managed care with LA Care Health Plan (LA Care).

3. Claimant lives in the family home with his parents and his sister. Claimant's Individual Program Plan (IPP) dated September June 7, 2016, described Claimant as happy, sweet, and a hard worker. It also described Claimant as having a good sense of humor and a good memory. The IPP documented Claimant's history of being resistive to change in his routine and having emotional outbursts once per week, during which he would whine and cry. Claimant's Service Coordinator also noted that Claimant's outbursts had decreased in intensity. In addition, the IPP noted Claimant's emerging interest in engaging with peers, and that his delays in communication interfered with his ability to be social. Claimant's parents planned to explore activities that would support Claimant's social development and

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<sup>2</sup> ABA therapy is used to treat individuals with autism in order to increase language and communication skills, improve attention, focus, social skills, memory, and academics, and to help decrease problem behaviors.

allow opportunities for Claimant to interact with his peers. WRC agreed to fund up to 40 hours per month of behavioral intervention provided by Intercare. The expected outcome was for Claimant to develop friendships and have opportunities for social and recreational activities in settings with children without disabilities.

4. Pursuant to a June 1, 2017 IPP Progress Report, Claimant continued to have emotional outbursts once per week that required intervention, and Claimant's father reported that Claimant had kicked and hit his parents and his peers. Claimant continued to lack social skills, and he had difficulty with changes to his routine and with taking turns when interacting with others. The Progress Report does not provide for the delivery of ABA services. WRC has not conducted an Annual Review of Claimant's IPP in 2018.

5. Claimant has been receiving ABA therapy from Intercare for approximately five years. He works with a team of Intercare staff, but has developed a rapport with Intercare providers Katy Lewis and John Gasper. Claimant's father described Claimant's progress since working with Intercare as "amazing." Whereas Claimant previously could not maintain a conversation or sustain eye contact, Claimant can now engage in conversations as a result of the ABA services provided by Ms. Lewis and Mr. Gasper.

6. Intercare is terminating its contract with LA Care's Medi-Cal managed care plan. However, approximately two weeks prior to the hearing, Intercare and LA Care notified Claimant's father of their agreement to continue providing ABA services to Claimant until December 31, 2018.

7. In its April 3, 2018 letter to Claimant's parents, the Service Agency indicated that it denied Claimant's request to fund ABA services provided by Intercare because it was prohibited from doing so by law, specifically, Welfare and Institutions Code section 4659.1 and Senate Bill 946. WRC informed Claimant's father that Claimant was required to transition to a new agency that is under contract with LA Care's Medi-Cal managed care plan. WRC also offered to assist Claimant's family with locating an agency that had a contract with LA Care.

8. Claimant requested a first level appeal, which the Service Agency conducted telephonically on April 10, 2018. WRC notified Claimant's father by letter dated April 10, 2018, that its decision remained unchanged and it denied Claimant's appeal.

9. Soryl Markowitz is employed as an Autism and Behavior Specialist at WRC and oversees the behavior services WRC provides to its clients. She obtained a certificate in Early Childhood Education and previously worked as an In-Home Behavioral Specialist. Ms. Markowitz is also a licensed clinical social worker, and she has worked at WRC for 29 years. As an Autism and Behavior Specialist, Ms. Markowitz works directly with the provider agencies, reviews all client behavior documents, and provides technical support to the agencies. She is also responsible for outreach and parent training, and she assists the Service Agency's clients with accessing services. Ms. Markowitz's duties also include attempting to resolve client complaints or concerns regarding WRC providers. Ms. Markowitz's testimony is afforded weight in light of her experience as detailed above.

10. Ms. Markowitz is familiar with the law governing the provision of WRC behavioral health treatment services. Her testimony established that under SB 946, behavioral health treatment services, including ABA therapy, for individuals under age 21 diagnosed with autism spectrum disorder, were transitioned from regional centers to Medi-Cal managed care and fee-for-service delivery systems. If regional centers opt to fund ABA services despite the transition to Medi-Cal, they are not reimbursed by the Department of Health Care Services, the state agency responsible for administering the Medi-Cal program.

11. Ms. Markowitz's testimony also established that WRC is a payor of last resort. In other words, if another program or insurer has the responsibility to pay for the costs of a service or support needed by a WRC client, that entity is generally required to pay for all or part of the services prior to WRC funding the service or support.

12. When behavioral health treatment services transitioned from the regional centers to Medi-Cal delivery systems, clients continued receiving services from their original agency if the agency contracted with a Medi-Cal managed care plan. Ms. Markowitz stated

that WRC staff understands the importance of the continuity of services and the difficulty individuals with autism experience when a change in service providers occurs. Besides Intercare, two other providers terminated their contracts with Medi-Cal managed care plans. WRC has no control over the providers and cannot compel providers to continue their contracts. However, when WRC learned that a provider intended to terminate its contract with a Medi-Cal managed care plan, it endeavored to work with its clients to provide for an overlap of services before the provider terminated its services. Ms. Markowitz explained that to accomplish this, WRC engaged agencies with contracts with Medi-Cal managed care plans. WRC would then fund, on a limited basis, the provision of services by the new agency at the same time as original agency. This allowed the new provider to be present and receive training while the original provider delivered ABA therapy services. The intended goal of the overlap in services was to ensure a smooth transfer of services and lessen the impact of the transition on the client. In addition, the overlap of services gave the WRC client an opportunity to become accustomed to the new provider.

13. At the current stage of the transition of the authority and payment of ABA services from regional centers to Medi-Cal, WRC would have to make an exception to fund an overlap of Claimant's ABA services from Intercare with a new agency that is contracted with LA Care. And, Ms. Markowitz testified that if WRC was to make this exception, it would only be able to fund the overlap for two weeks.

14. WRC offered to assist Claimant's family with locating an agency that is contracted with LA Care and provided Claimant's family with a list of ABA providers that included the providers' insurance contract information.<sup>3</sup> Claimant's parents did not respond to the offer or otherwise seek assistance from WRC.

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<sup>3</sup> The list was prepared by WRC on August 2, 2017. Ms. Markowitz testified that an additional provider was added to the list, and the list is otherwise current as of the date of the hearing.

15. Intercare currently provides ABA services to clients enrolled in a Medi-Cal fee for service plan. WRC, however, did not inform Claimant's parents of that fact. Ms. Markowitz testified that beginning July 1, 2018, funding for delivery of behavioral health services under the Medi-Cal fee-for-service program would be transitioned to the Department of Developmental Services. Ms. Markowitz stated that she did not know whether Claimant could be enrolled in the Medi-Cal fee-for-service program.<sup>4</sup> She explained that WRC did not make Medi-Cal eligibility decisions and that Claimant's parents would have to contact the Department of Health Care Services or any other Medi-Cal representative to obtain information regarding transferring from managed care to fee-for-service Medi-Cal.

16. Claimant's father testified that he was told two years ago<sup>5</sup> that Claimant would continue to receive services from Intercare. He explained that he is trying to help his son, and was seeking ways for Claimant to continue to receive ABA services from Intercare. He was disappointed by WRC's decision to deny funding, and that he was simply told "no." He was not notified of other possible options for Claimant to remain with Intercare, such as transferring to fee-for-service Medi-Cal.

17. Claimant's father asked Ms. Markowitz several questions on cross-examination regarding the insurance plans Intercare accepted and fee-for-service Medi-Cal, and

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<sup>4</sup> Claimant's father moved to continue the hearing on the grounds that WRC was not prepared to go forward with the hearing. He contended that since Ms. Markowitz did not know whether Claimant was eligible for fee-for-service Medi-Cal, WRC did not know whether Claimant could continue receiving ABA services from Intercare since Intercare continued to provide ABA therapy services to individuals enrolled in Medi-Cal's fee-for-service program. The ALJ denied the motion.

<sup>5</sup> The record does not indicate who allegedly provided Claimant's father with this information.

expressed a desire to explore options to determine whether Claimant could continue to receive ABA services from Intercare. While the ALJ found that the questions posed by Claimant's were outside the scope of the fair hearing request, Ms. Markowitz offered to discuss these issues with Claimant's father at a later time.

18. There is no dispute that Claimant is eligible for ABA services and LA Care has not denied the provision of those services. However, the responsibility for providing behavioral health treatment services has transitioned from WRC to Medi-Cal. In addition, legislation prohibits WRC from funding ABA services with Intercare. However, WRC offered to provide assistance to Claimant's family with obtaining information regarding ABA providers and to engage in a discussion with Claimant's family regarding exploring options, if any, for Claimant to continue to receive ABA services from Intercare. If Claimant's parents wish to avail themselves of that assistance, they must communicate and cooperate with WRC and provide WRC with any necessary information.

## LEGAL CONCLUSIONS

1. This case is governed by the Lanterman Developmental Disabilities Services Act (Welfare and Institutions Code section 4500 et. seq., referred to as the Lanterman Act Lanterman Act).<sup>6</sup> Under the Lanterman Act, an administrative "fair hearing" is available to determine the rights and obligations of the parties. (§ 4710.5.) Claimant requested a fair hearing to appeal the Service Agency's proposed denial of funding for ABA services to be provided by Intercare. Jurisdiction in this case was thus established.

2. The standard of proof in this case is the preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.) Claimant is requesting that the Service Agency fund the provision of ABA services by

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<sup>6</sup> All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Intercare. Under these circumstances, Claimant bears the burden of proof.

3. Under the Lanterman Act, the State of California accepts responsibility for persons with developmental disabilities. The Lanterman Act mandates that an “array of services and supports should be established . . . to meet the needs and choices of each person with developmental disabilities . . . and to support their integration into the mainstream life of the community.” (§ 4501.) These services and supports are provided by the state’s regional centers. (§ 4620, subd. (a).)

4. The California Legislature enacted the Lanterman Act “to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community . . . and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community.” (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

5. Regional centers must develop and implement IPPs, which shall identify services and supports “on the basis of the needs and preferences of the consumer, or where appropriate, the consumer’s family, and shall include consideration of . . . the cost-effectiveness of each option . . . .” (§ 4512, subd. (b); see also §§ 4646, 4646.5, 4647, and 4648.) The Lanterman Act assigns a priority to services that will maximize the consumer’s participation in the community. (§§ 4646.5, subd. (a)(2); 4648, subd. (a)(1), (2).)

6. Regional centers have a duty to identify and pursue all possible sources of funding for consumers receiving regional centers, including Medi-Cal. (§ 4659, subd. (a).) They are prohibited from purchasing any service that would otherwise be available from Medi-Cal, private insurance, or a health care services plan when a consumer or a family meets the criteria of this coverage but chooses not to pursue that coverage. (§ 4659, subd. (c).) In addition, a regional center is prohibited from purchasing medical services for a consumer unless the regional center is provided with documentation of a Medi-Cal, private insurance, or a health care service plan denial, and the regional center determines that an

appeal by the consumer or family of the denial does not have merit. (§ 4659, subd. (d)(1).)

7. Section 14132.56, subdivision (a)(1) provides that behavioral health treatment shall be a covered Medi-Cal service for individuals under 21 years of age with an Autism Spectrum Disorder diagnosis. Pursuant to section 14132.56, the authorization and payment of behavioral health treatment services provided to Medi-Cal beneficiaries transitioned from regional centers to Medi-Cal managed care delivery systems.

8. Health and Safety Code section 1374.73, subdivision (c)(1) provides that ABA is a behavior health treatment.

9. Claimant has not met his burden of proving that WRC should fund ABA services provided by Intercare. Claimant is enrolled in a Medi-Cal managed care plan administered by LA Care. The authorization and payment of ABA services for individuals under 21 years of age diagnosed with Autism Spectrum Disorder has transitioned from WRC to Medi-Cal. In addition, WRC is a payor of last resort and, as provided by statute, it is prohibited from purchasing ABA services where, as here, the services are available from Medi-Cal. As such, WRC is prohibited from funding ABA services with Intercare. While Claimant may desire to transfer from a Medi-Cal managed care delivery service to fee-for-service Medi-Cal, WRC does not administer the Medi-Cal program, nor does it make Medi-Cal eligibility determinations. For the foregoing reasons, Claimant's appeal shall be denied.

10. The issue regarding Claimant's possible transition from Intercare to another ABA provider is ongoing and shall reoccur because LA Care and Intercare have agreed to continue providing ABA services for Claimant only until December 31, 2018. While WRC is not responsible for the authorization and payment of Claimant's ABA services, it has offered, and continues to offer, to assist Claimant's family with locating another ABA provider that is contracted with LA Care and to answer any questions Claimant's family has regarding options, if any, for continued provision of ABA services from Intercare after December 18, 2018. To the extent that Claimant's parents wish to accept WRC's offer of assistance, they must communicate and cooperate with WRC and provide any information requested by

WRC. (See Civ. Code § 3521 [“He who takes the benefit must bear the burden.”].) The matters are appropriate for discussion at Claimant’s IPP Annual Review meeting.

## ORDER

1. Claimant’s appeal is denied. The Service Agency’s denial of Claimant’s request for the Service Agency to fund the provision of ABA services by Intercare to Claimant is affirmed.

2. To the extent Claimant’s parents communicate and cooperate with WRC, WRC shall assist Claimant’s family with locating another ABA provider contracted with LA Care.

Dated:

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CARMEN D. SNUGGS  
Administrative Law Judge  
Office of Administrative Hearings

## NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.